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Supreme Court of the United States

October Term, 1972

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE BOEING COMPANY, AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief *amicus*, in support of the position of Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

I

The first of the two questions presented here is whether § 8(b)(1)(A) of the National Labor Relations Act empowers the National Labor Relations Board to review union fines, enforceable in court, which have been imposed upon members who violate a valid union rule (here a prohibition on crossing a picket line during a strike), to determine whether those fines are excessive in amount.

This is the fifth case in the line stemming from *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, raising an issue as to the scope of the Board's authority to oversee the process by which union members define the norms regulating the conduct of their affairs, develop procedures for the adjudication of alleged violations, and determine the scale of appropriate sanctions. See also *NLRB* v. *Marine & Shipbuilding Workers*, 391 U.S. 418; *Scofield* v. *NLRB*, 394 U.S. 423; *NLRB* v. *Granite State Joint Board*, ... U.S. ....., 41 U.S.L.W. 4074 (Dec. 7, 1972). Moreover, in delineating the preemptive effect of the NLRA, this Court has repeatedly addressed itself to the interplay between § 8(b)(1)(A) and the state and federal (the Labor Management Reporting and Disclosure Act of 1959) law enforceable in court that regulates union discipline. See *Machinists* v. *Gonzales*, 356 U.S. 617; *Plumbers Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701; *Boilermakers* v. *Hardeman*, 401 U.S. 233; *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274. This sustained attention to the ramifications of § 8(b)(1)(A) requires, as

the first step in analysis, an explication of the basic principles developed in those cases.

1. Initially, there can be no doubt that every aspect of the right to enact and enforce disciplinary rules is sharply circumscribed. The inhibitions on union action designed to assure that a member charged with an offense will be dealt with honestly, fairly, and in accordance with public policy, are comprehensive. The complex of public law, which includes § 8(b)(1)(A) as one of its strands, only "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield*, 394 U.S. at 430. And the injunction against unreasonable enforcement finds its major expression in the state law invalidating excessive penalties. "[S]tate courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship'." *Allis-Chalmers*, 388 U.S. at 193, n. 32. Thus we acknowledge at the outset that "a union rule * * * forbidding the crossing of a picket line during a strike," the subject matter here, must be "duly adopted and not the arbitrary fiat of a union officer," and can only be enforced "against voluntary union members by expulsion or a reasonable fine." *Scofield*, 394 U.S. at 428.

To state the full range and breadth of the substantive law both administrative and judicial, state and federal, however, is not to fix the metes and bounds of the prohibitions contained in § 8(b)(1)(A). The two are not coextensive. This Court, from the first, has recognized that in enacting that section Congress intended to grant the

Board a sharply restricted authority. "The protection of union members in their rights as members from arbitrary conduct by unions and officers has not been undertaken by [the] federal law [embodied in the NLRA], and indeed * * * [in] the proviso to § 8(b)(1) * * * the assertion of any such power has been expressly denied." *Gonzales*, 356 U.S. at 620. Section 8(b)(1)(A) and its proviso, in the Board's words, "precludes * * * [Board] interference with [the] internal affairs of a labor organization." *Minneapolis Star & Tribune Co.*, 109 NLRB 727, 729. Thus:

> "The fairness of an internal union disciplinary proceeding * * * can [not] be said to raise issues 'within the special competence' of the NLRB. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181, 193-194 (1967). As we noted in that case, the 86th Congress which enacted § 101(a)(5) [of the LMRDA which guarantees procedural due process] was 'plainly of the view' that the protections embodied therein were new material in the body of federal labor law. 388 U.S., at 194. And that same Congress explicitly referred claims under § 101(a)(5) not to the NLRB, but to the federal district courts." *Hardeman*, 401 U.S. at 239.

Indeed, even the LMRDA, the statute in which "Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline" (*Allis-Chalmers*, 388 U.S. at 194), is "more limited in scope than much state law" (*Hardeman*, 401 U.S. at 244, n. 11). While the LMRDA insures members charged with an offense procedural due process, and prohibits discipline for the exercise of freedom of speech or

assembly, it does not place any limitations on the sanctions which may be imposed on a member who has been found to have violated a valid union rule in a fair proceeding. It is therefore true today, as it has been throughout the evolution of our federal labor policy, that, in general, "the regulation of the relationship between union and employee is a contractual matter governed by local law" which constitutes a "federally unentered enclave." *Scofield* 394 U.S. at 426 n. 3.

2. The issue before the Court narrows then to determining the precise role § 8(b)(1)(A) was intended to fill in the overall regulation of union discipline.

As such early decisions as *Minneapolis Star & Tribune*, and *National Maritime Union*, 78 NLRB 971, 982-987 enforced 175 F 2d. 686 (C.A. 2), demonstrate, it has been understood from the outset that the primary function of § 8(b)(1)(A) is to prevent "the union from inducing the employer to use the emoluments of the job to enforce the union's rules," and to proscribe "union coercion, such as physical violence to induce employees to join the union or to join in a strike." *Scofield*, 394 U.S. at 428 n. 4, 429. And in *Allis-Chalmers* this Court:

> "essentially accepted the position of the National Labor Relations Board dating from Minneapolis Star & Tribune Co., * * * where the Board also distinguished internal from external enforcement, * * * in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority." *Scofield* 394 U.S. at 428.

Thus, § 8(b)(1)(A) interdicts "means unacceptable in themselves, such as violence or employer discrimination," while leaving the regulation of "internal technique[s of enforcement such as] union fines, collected by threat of expulsion or judicial action" to the courts. *Id.* at 430-431.

There are two caveats, both necessary to preserve the overall integrity of the NLRA, to the proposition that so long as the union limits itself to "internal techniques" of enforcement, the Board has no regulatory role to play. As such recent cases as *Charles S. Skura*, 148 NLRB 679, and *NLRB* v. *Marine & Shipbuilding Workers*, 391 U.S. 418, demonstrate, even purely internal means of enforcement, such as expulsion, are subject to Board review to ascertain "the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated." *Scofield*, 394 U.S. at 431. Union rules which interfere with the right of the Board to entertain charges, thereby "frustrat[ing] the enforcement scheme established by the statute" (*id.* at 430), are, therefore, beyond the ambit of "the internal affairs of the union" protected by § 8(b)(1)(A)'s proviso (*Marine & Shipbuilding Workers*, 391 U.S. at 425).

On the other hand, "as Allis-Chalmers and Marine Workers made clear, it does not follow from * * * the fact that the rule has and was intended to have an impact beyond the confines of the union organization * * * that the enforcement of the rule violates § 8(b)(1)(A), unless some impairment of a statutory labor policy can be shown." *Scofield*, 394 U.S. at 432. The NLRA is "not aimed at completely internal union discipline of union members, even though the discipline may result in the member's refusal to

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accept work offered by the employer. Allis-Chalmers makes this quite clear." *Id.* at 435-436. The Act does not grant union members a right to work for a struck employer in violation of a union rule against strikebreaking. Internal union discipline "to protect against erosion, its status" as exclusive bargaining agent (*Allis-Chalmers*, 388 U.S. at 181) is permissible. While union-induced employer discrimination for crossing a picket line during a strike in violation of a union rule is proscribed because that means of securing the union's ends is "unacceptable in [it]self" (*Scofield*, 394 U.S. at 431); union fines enforceable in court for the same offense are lawful because both the end sought, and the means utilized, comport with the letter and policy of the Act. Thus, where the union rule in question is valid, the "policy of the Act is to insulate employees' jobs from their organizational rights" by assuring that as "an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union security contract; * * * but as a union member, so long as he chooses to remain one, he is subject to union discipline." *Id.* at 429 n. 5.

Finally, since its proviso only serves to carve Board regulation of the union-member relationship out of §8(b)(1)(A), enforcement of union rules against former members who have lawfully resigned is an unfair labor practice:

> "The *Scofield* case indicates that the power of the union over the members is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in con-

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duct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street." *Granite State,* 41 U.S.L.W. at 4075.

In sum, under the present regime, the Board is empowered to protect members from discipline through employer discrimination or violence, to assure that union discipline is not predicated on rules inconsistent with the NLRA's policies, and to preclude discipline of non-members. But that agency's mandate ends where the union acts against a "member as a member rather than as an employee" (*Wisconsin Motor Corp.*, 145 NLRB 1097, 1104), to vindicate a rule which is consistent with the NLRA's policies.

3. The central lesson of the legislative history of § 8(b)(1)(A), and the language of its proviso, is that "it was not the intent of the sponsors in any way to regulate the internal affairs of unions." *Allis-Chalmers,* 388 U.S. at 191-192. The law as summarized above is consistent with that intent. Section 8(b)(1)(A), as it has been interpreted thus far, interdicts "external" means of enforcement, measures union rules against external standards embodied in the NLRA, and prohibits the imposition of union sanctions against non-members, *i.e.* individuals external to the organization. On the other hand, the great bulk of union disciplinary proceedings are not subject to Board regulation. So long as the union confines itself to enacting rules which do not conflict with the NLRA, alleged

defects in the trial and punishment of a member as a member are solely for the courts.

If the phrase "internal union affairs" is to be given any content, it must include the processes designed to adjudicate alleged violations of valid union rules. It follows that if this core area is opened to Board review on a case-by-case basis, nothing is left of the Congressional intent to leave significant aspects of the union-member relationship unregulated by the NLRA. And it is plain from the list of criteria proposed by the court below[1] that a reading of § 8(b)(1)(A) which would require the Board to review the judgments reached by union trial boards to ascertain whether they have acted properly in assessing a fine enforceable in court does entail supervision of union discipline on a case-by-case basis. The factual combinations and permutations which must be considered under this standard are limitless and are all but impossible to capture in *per se* rules.

Nor is there any rational way to limit Board intrusion into union affairs to the review of the validity of the sanction imposed. There is nothing in the Act, and no overall scale of values, which justifies the conclusion that an

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[1] "The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined for strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant." Pet. App. 29.

"excessive" fine imposed after proper procedures is more subject to censure than a "reasonable" fine imposed without procedural due process. Indeed, the guidance Congress has given in Title I of the LMRDA indicates that while preservation of procedural due process is a federal concern, the scale of the sanctions imposed after a fair trial is not.

By the same token, there is no principled distinction which would draw the line at Board regulation of discipline in picket line cases. In *Allis-Chalmers* this Court was unanimous in recognizing "the validity of the union rule against its members crossing picket lines during a properly called strike * * *." 388 U.S. at 198 (Mr. Justice White, concurring). The argument for Board regulation of the size of a fine imposed for a violation of that rule must, therefore, proceed on the theory that "excessive" fines violate § 8(b)(1)(A) even though the union's ultimate object is entirely compatible with the policies of the Act. And if the substantive validity of the rule does not preclude Board jurisdiction in the instant cases, it follows that the Board also has the obligation to scrutinize the reasonableness of fines for wildcat activity, for participation in a breach-of-contract strike, and as *Minneapolis Star & Tribune* indicates (109 NLRB at 737), even for refusals to attend union meetings.

Thus, the rationale of the decision below completely undermines the distinction between "internal and external enforcement" of union rules developed by the Board, and "essentially accepted" by this Court (*Scofield*, 394 U.S. at 428), to express the congressional judgment that " 'purely internal union matters' [are] a subject the National Labor Relations Act leaves principally to other processes of law"

(*Lockridge*, 403 U.S. at 296). The closest the lower court came to providing a statutory predicate for this novel expansion of the Board's jurisdiction was the suggestion that "[w]here a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension" and that such a result is contrary to the "protective policy of the Act" against penalties which would "impare the members status as an employee." Pet. App. 30a. But this is to misstate the policy of the Act. *Allis-Chalmers* squarely holds that the Act does not protect an employee against internal union discipline—including court-enforced fines—designed to "result in the member's refusal to accept work offered by the employer" (*Scofield*, 394 U.S. at 436). The policy of the Act this Court has deemed to be controlling is that "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *." *Allis-Chalmers*, 388 U.S. at 181. This power plainly encompasses court-enforced fines for strikebreaking sufficient to secure complete compliance with the union's rule. For nothing less will achieve the objective sanctioned in *Allis-Chalmers*—the maintenance of strike solidarity through internal union discipline. To be sure the union is not permitted to achieve the same objective through union-induced employer actions against employees. But this limitation is not based on the view that union members who work for a struck employer despite their union's contrary rule are to be assured of a profit for their violation. Rather, it finds its roots in "the explicit wording of § 8(b)(2)" which was intended to "limit union power to compel an

employer to discharge a terminated member," but was not intended "to interfere with union self-government or to regulate a union's internal affairs." *Allis-Chalmers*, 388 U.S. at 195.

Allis-Chalmers is instinct with the proposition that internal union discipline to preserve strike solidarity is an "economic weapon" which "is part and parcel of the system" and which "acts as a prime motive power for agreements in free collective bargaining" (*NLRB* v. *Insurance Agents International*, 361 U.S. 477, 489). And the critical role played by "the presence of economic weapons in reserve" in the bargaining process has caused this Court to stress the point that neither the Board nor the courts are empowered to strike such weapons from the parties' hands without a specific warrant from Congress. Any other rule would allow an administrative agency, or the judiciary, to exercise a "considerable influence upon the substantive terms on which the parties contract" since "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." *Id.* at 490. The right acknowledged in *Allis-Chalmers*, for example, would be rendered meaningless if, as proposed by the court below, it could be whittled down to the point where union members would be assured that they will be better off if they violate the union's rules than if they obey them. Such "influence" is, therefore, forbidden because "our labor policy is not presently on a foundation of government control of the results of negotiations." *Insurance Agents*, 361 U.S. at 490. The national labor policy does not allow the Board, or the courts, "to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and

'abusive' economic weapons into * * * the Act." *Id.* at 497-498; *see also, Porter Co.* v. *NLRB*, 397 U.S. 99, 102-104, 107-108. Thus, the statutory content the lower court would provide to elucidate the concept of excessive fines is based on a misunderstanding of what the NLRA is all about. Neither the state courts, if they are to regulate union fines on their own, or those courts and the Board in the exercise of concurrent jurisdiction, may disregard the paramount policy of the Act precluding the invalidation of a fine merely sufficient to secure "the member's refusal to accept work offered by the employer" (*Scofield*, 394 U.S. at 436). See *Insurance Agents*, 361 U.S. at 489-490, 497-498; *Bus Employees* v. *Missouri*, 374 U.S. 74; *Teamsters Union* v. *Morton*, 377 U.S. 252.

4. The legal analysis contained in the decision below is, as we have attempted to demonstrate, inadequate to sustain the result reached. That decision is, however, fully adequate in revealing the concerns that animated the court below. The arguments developed therein make it plain that the lower court believed that there should be a uniform federal law enforced by the Board which regulates all forms of union discipline that touch the employment relationship, and that this law should be grounded in a policy of protection for members who wish to work in violation of the union's rules.

"But Congress's policy has not yet moved to this point" (*Insurance Agents*, 361 U.S. at 500). The substantive law of § 8(b)(1)(A), as it stands, does not grant union members the right to violate union rules against crossing picket lines or exceeding production quotas, free of internal union discipline effective to secure "the members refusal to accept work offered by the employer" (*Scofield*, 394 U.S. at 436). Congress chose instead to simply prohibit enforcement of

valid union rules by union induced employer discrimination or violence. See pp. 5-8 *supra.*

Moreover, the decision to exclude Board oversight of internal techniques of enforcing union rules even though they relate to the employment relationship is no isolated anomaly. A case can be made for centralizing all aspect of labor law in a single federal statute enforced by a single tribunal staffed by government prosecutors. But Congress has chosen to provide the Board with a narrower range of questions to answer. The scope of unreasonable employer action detrimental to employees untouched by the NLRA is vast. It is captured in the rubric that employer discipline is not an unfair labor practice if imposed for good reason, bad reason, or no reason at all so long as it is not an anti-union reason. See, e.g., *NLRB* v. *Nabors,* 196 F.2d 272, 275 (C.A. 5) cert. denied 344 U.S. 865. And it is, of course, equally well settled that the parties are free to utilize "economically harassing" bargaining tactics not specifically prohibited without running afoul of the Act. See pp. 12-13 *supra.*

The foregoing are instances in which federal law does not condemn that which might well be condemned. But even where Congress chooses to interdict conduct logically related to that regulated by the NLRA it has not invariably chosen to entrust enforcement to the Board, even where the contrary decision entails the drawing of lines more nice than obvious. The classic example is the enforcement of collective agreements. The ultimate purpose of the NLRA, in the words of § 1, is to "encourag[e] the practice and procedure of collective bargaining." And §§ 8(a)(5), 8(b)(3) and 8(d) impose substantial continuing responsibilities on

the Board during a contract term. See *NLRB* v. *C&C Plywood Co.*, 385 U.S. 421. But in passing § 301, and rejecting the proposed § 8(a)(6) of S. 1126, 80th Congress, 1st Sess., "Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements and that such matters should be placed within the jurisdiction of the courts." *C&C Plywood*, 385 U.S. at 427 (footnotes omitted).[2]

In short, both the specific language and legislative history of § 8(b)(1)(A) and the overall pattern of the Act support the Board's conclusion that:

> "The Board has long recognized that, as a practical matter, 'virtually all union rules affect a member's employment relationship.' However, given the legitimacy of the rule, the only question of relevance to the agency enforcing this Act is 'whether, in enforcing the rule, the Union goes outside the area of union-membership relationship and enters the area of employee-employer relationship.' The Union has not done so here, nor has it sought to vindicate a policy in conflict with the National Labor Relations Act, and the Act does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest."

II

In *Granite State Joint Board*, this Court recognized that

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[2] This pattern of fragmenting responsibilities that might well be unitary is not confined to the allocation of jurisdiction between the Board and the courts. It is also a prominent aspect of the LMRDA. For example, regulation of union elections procedures is divided between Title I, enforceable by private suit, and Title IV enforceable solely by the Secretary of Labor. The resulting allocational problems were explored in *Calhoon* v. *Harvey*, 379 U.S. 134.

"under § 7 of the Act the employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection;" and that so long as "no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union" is presented, the Board is "to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from association, as he sees fit 'subject to any financial obligations due and owing' the group with which he was associated." Thus "where, as [in Granite State], there are no restraints * * * [stemming from] the contractual relationship between union and member * * * on the resignation of members," the Court concluded that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May." 41 U.S.L.W. at 4075.

The Machinists Constitution now expressly provides, in a provision which took effect January 1, 1973:

> "Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 11 days preceding its commencement."

Moreover, at the time the instant case arose the Union's Constitution prohibited a member from "[a]ccepting employment in any capacity in an establishment where a strike * * * exists." And the Union has consistently interpreted this prohibition as requiring a member to abstain

from strikebreaking for the duration of an existing strike notwithstanding a mid-strike resignation.

The statutory question presented here is, therefore, whether a constitutional provision conditioning the right to resign union membership on a continuing commitment not to break a strike in progress (or in immediate contemplation), is valid under the proviso to § 8(b)(1)(A).[3]

Section 8(b)(1)(A) prohibits restraint and coercion of employees in the exercise of § 7 rights, and its proviso preserves "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." The provision in the Machinists Constitution conditioning the right of members to resign during a strike on the continued commitment to the obligation, undertaken during membership, to respect the strike, is squarely within the proviso's language—it is a "rule with respect to the * * * retention of membership." Thus, to the extent that it can be said that this inhibition on resignation at will and free of all continuing obligations, restrains and coercises union members in the exercise of § 7 rights, it is precisely "[s]uch restraint and coercion [that] Congress permitted by adding the proviso to § 8(b)(1)(A)" (*Allis-Chalmers*, 388 U.S. at 198, Mr. Justice White concurring.)

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[3] The following question as to the proper construction of the Machinist's Constitution is also presented—whether, assuming arguendo that such provisions are valid, the provision in the Union's Constitution in force at the time the instant case arose, was sufficiently express to impose a restraint on post-resignation strikebreaking. This latter question is treated in detail in the Machinist's brief, and we incorporate the Union's discussion in this brief at this point as if it were our own.

Moreover, the Union's rule is one which can survive the most searching scrutiny as to "the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated" (*Scofield*, 394 U.S. at 431).

The interest vindicated is that specified in *Allis-Chalmers*, 388 U.S. at 181; "to protect against erosion [the union's] status" as collective bargaining representative during the "vital [juncture] when the members engage in strikes." For:

> "To say that Congress meant in 1947 by the § 7 amendments and § 8(b)(1)(A) to strip unions of the power to fine members [who resign during a strike] for strike-breaking * * * is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon * * * [w]here the union is weak, and membership therefore of little value * * *." *Id.* at 183.

And the method chosen to vindicate that interest is perfectly consistent with the policy of the Act. *Granite State* holds that where the union's constitution is silent, the § 7 right to refrain from concerted activity protects the right to resign. But as *Allis-Chalmers* and *Scofield* demonstrate, the § 7 "right to refrain" does not grant union members the freedom to disregard the union's rules at will. It is not a license to join a union as a full member under one's own terms. For, § 7 also provides an equal right "to form [and] join * * * labor organizations." And an organization with rules that all may disobey is a contradiction in terms. It is an anarchy. The right to asso-

ciation to further common goals presupposes the right to enact and enforce membership obligations. "The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer, and loss of membership." Cf. *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. ....., 41 U.S.L.W. 4097, 4102 (Jan. 9, 1973). And to the extent this is not plain from § 7 itself, it is made explicit in the proviso to § 8(b)(1)(A). The § 7 right to refrain from concerted activity can not, therefore, be expanded to the outer limits of its logic; for if it were, it would render the § 7 right to engage in concerted activity, as amplified by the proviso to § 8(b)(1)(A), a nullity. This portion of the Act, like others:

> "represented the Congressional response to competing demands * * * Had Congress thought one or the other over-riding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable." *Local 1424 Machinists* v. *NLRB*, 362 U.S. 411, 418 n. 7.

That line has been marked out with precision in *NLRB* v. *UAW*, 320 F.2d 12, 15-16 (C.A. 1) where the court upheld a requirement, which limited resignation to a specified period during each year, intended to insure "uniform practices to preserve [the union's] financial standing by establishing reasonable times for resignations by those who were in good standing:"

> "Under Section 7 * * * the employee has indeed the unfettered right to abstain from indulging in union activity. He need not 'form,' 'join' or 'assist' a labor

> organization and * * * this inactivity cannot be the source of recriminations. It is by now too clear for citation that this facet of Section 7 was designed to prevent forcing the unwilling worker into a union.
>
> "However, we believe that it is quite another thing when the employee eschews his 'reluctance' and voluntarily joins a labor organization. At this point, under our view, the employee takes off the protective mantle of Section 7's 'refraining' provision and renders himself amenable to the reasonable internal regulations of the organization with which he chooses to cast his lot. * * *
>
> "In short, we believe that the Union's Constitution and By-laws—here relevant—were valid and viable provisions with which the employees had to comply if they desired to effectively sever their relationship with the Union. It is true that under section 7 of the Act * * * the subject employees need not have joined the Union. However, once they voluntarily took that step, they embraced not only the benefits but also the burdens which flowed from their union membership. One of those 'burdens' was the duty of comporting with the Union's reasonable internal regulations * * *."

In contrast, then, to the right to file charges with the Board, which is an absolute (*Marine & Shipbuilding Workers*, 391 U.S. at 425), the § 7 right to refrain from concerted activity, and the right to resign, which is derived therefrom, are qualified. While employees who voluntarily assume full membership, and by so doing subject themselves to the "provisions defining punishable conduct and the procedures for trial and appeal [that] constitute part of the contract between member and union" (*Allis-Chalmers*, 388 U.S. at 182), "are free to leave the union and escape the

rule" (*Scofield*, 394 U.S. at 430), that freedom is subject to reasonable union rules. And there can be no doubt that it is reasonable to condition resignation during, or in immediate contemplation of, a strike, on continued adherence to the union's rule against strikebreaking.

As already noted (p. 19 *supra*), the end sought—preservation of strike solidarity—is legitimate under *Allis-Chalmers*. And the restriction imposed on the members freedom of action is precisely attuned to the exact achievement of that end and no more. The individual's opportunity to determine whether he will engage, or refrain from engaging, in concerted activity takes precedence up to the point at which its exercise would destroy the group's opportunity to evaluate its true strength in making its final calculation as to whether to capitulate to the employer or commit itself to utilization of "the ultimate weapon in labor's arsenal for achieving agreement upon its terms," (*Allis-Chalmers*, 388 U.S. at 181). Even after that point the individual may dissolve all his ties to the union except the one essential to permit it to prosecute the strike. And, of course, the union's reservation of authority terminates at the end of the strike—the point at which the member's prior failure to resign can no longer be said to have induced a justifiable reliance on the continuing ability to discipline him for breaches of loyalty in the face of the enemy.

In sum, the Machinists rule conditioning the right to resign is an internal union rule within the literal language of the proviso to § 8(b)(1)(A) which is entirely compatible with the NLRA's policies. Under the principles developed in this Court's decisions from *Allis-Chalmers* to *Granite State* it is therefore lawful.

CONCLUSION

For the reasons stated above, as well as those stated by the Union, the judgment below should be reversed and the case remanded to the Court of Appeals with directions to affirm that part of the Board's order dismissing the portions of the complaint which rests on the alleged unreasonableness of the fines, and to set aside that part of the Board's order granting relief which rests on the conclusion that the Union may not discipline post-resignation strike-breaking by imposition of a court-collectible fine.

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February, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a–33a)[2] is reported at 459 F. 2d 1143. The decision and order of the National Labor Relations Board (Pet. App. 34a–46a) are reported at 185 NLRB No. 23.

[1] This brief will discuss only the resignation question (*infra*, p. 2). The other question, respecting the Board's power to determine the reasonableness of the fine, is discussed in the Board's brief in No. 71-1607, which has been consolidated with this case.

[2] "Pet. App." refers to the appendix to the petition for certiorari in No. 71-1417. "A." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–3a) was entered on March 14, 1972. The petition for a writ of certiorari was filed on May 1, 1972, and was granted on December 18, 1972 (A. 205–206). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at page 2 of the Board's brief in No. 71–1607.

QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act by assessing, and seeking judicial enforcement of, a fine against an employee for working during a strike after his resignation from the union.

STATEMENT

The facts are fully set forth in the Board's brief in No. 71–1607 (pp. 3–7). We repeat only those facts which are relevant to the question discussed herein.

On September 16, 1965, the day after the expiration of a collective bargaining agreement between the Union[3] and the Company,[4] the Union struck and picketed the Company's Michoud, Louisiana plant in furtherance of demands for a new contract. During the 18 days that the strike continued, 143 of the 1900 production and maintenance employees represented by the Union at Michoud crossed the picket line and went to work. All of the 143 employees had

[3] Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO.

[4] The Boeing Company.

een members of the Union prior to the strike;[5] 61 rote letters to the Union resigning their membership before crossing the picket line, 58 resigned by tters sent after they went back to work, and the rest id not resign. The Union's constitution and bylaws ontained no provisions expressly permitting or forbidding such resignations from the Union (Pet. App. 0a, n. 11; A. 11, 42, 111, 118).[6]

The strike terminated on October 4, 1965, following atification of a new contract by the Union membership. In late October or early November, the Union otified all employees who had crossed the picket ne, including those who had resigned their Union embership, that charges were being brought against em under the Union constitution. The constitution rovided for the imposition of a fine or other discipline against a member who accepted "employment in

[5] The prior contract contained a maintenance-of-membership ause, which required new employees to become members of e Union as a condition of continued employment unless they otified both the Union and the Company, within 40 days accepting employment, that they did not desire to join e Union. The contract also required employees who already ere Union members to retain their membership during the rm of the contract. (Pet. App. 35a; A. 154–158.)

[6] The constitution provides that membership may be canlled where a member is delinquent for three months in the yment of dues or special levies. There is also a constitutional ovision whereby a member who ceases working at the trade who becomes a supervisor can obtain an honorary withawal card. (A. 141–142.) Union business representative Higns testified that there was no provision whereby a member uld "resign by letter": the "only way a man might resign om the International Association of Machinists, was by being arrears—honorary withdrawal card—become three months in rear in dues or be suspended by the Local, itself or by the ternational," or "by death" (A. 111).

any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" (A. 143). Fines were thereafter imposed on all the employees who had gone to work during the strike, regardless of whether, or when, they had resigned from the Union. The Union has filed civil suits against several employees to collect the fines, plus attorney's fees and interest.

Upon a charge filed by the Company, the Board held that the Union violated Section 8(b)(1)(A) of the Act by fining those employees who had resigned from the Union before returning to work during the strike, and by fining those who had resigned after returning to work to the extent that such fines were based on post-resignation work (Pet. App. 37a–42a). But the Board held that the fines imposed on those employees who had not resigned from the Union, and those imposed on resignees for work done while they were still members did not violate the Act (Pet. App. 42a–43a). The Board's decision rested upon the rationale that the member's duty of fidelity to the Union and the Union's corresponding right to discipline him for breach of that duty are extinguished upon the member's resignation from the Union; that, since the Union constitution and bylaws had no procedure for voluntary resignation, the member was free to resign at will; and that the Union's right to discipline employees thus terminated upon receipt of the employees' letters of resignation (Pet. App. 39a–40a; 20a, n. 21).

The Board ordered the Union to cease and desist from fining employees who had resigned from the

Union for their post-resignation work during the strike, and from seeking court enforcement of such fines. It further ordered the Union to reimburse employees who had already paid fines for any amount imposed because of their post-resignation work. (Pet. App. 43a–44a.)

The court of appeals sustained the Board's factual findings and its holding that the Union violated Section 8(b)(1)(A) of the Act by fining employees who had resigned from the Union prior to returning to work, and those who had resigned after returning to work for post-resignation work (Pet. App. 16a–22a).

SUMMARY OF ARGUMENT

This Court's decision in *National Labor Relations Board* v. *Granite State Joint Board,* No. 71–711, decided December 7, 1972, requires that the decision of the court below be affirmed insofar as it sustains the Board's holding that the Union violated Section 8(b)(1)(A) of the Act by fining employees who resigned from the Union for work done after such resignation, and seeking judicial enforcement of such fines. The Union's constitution and bylaws in the instant case, as in *Granite State,* contained no express limitation on a member's right to resign. Thus, here, as in *Granite State,* members were free to resign and return to work during the course of a strike initiated while they were members.

The existence of a constitutional provision stating that union members should not work in a struck plant is not significant, since it does not indicate that the obligation continues after the member has resigned.

It is not appropriate to extend this obligation to former union members by implication in order to protect the Union's interest in unity. *Granite State* shows that considerations of mutual reliance do not warrant implying such an undertaking by union members. Moreover, since the employee's right to refrain from concerted activities is expressly protected by Section 7, a waiver of that right should not rest on implication. This conclusion is particularly appropriate here since the contract between the member and the union is a "contract of adhesion"; the member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Therefore, any doubt as to the meaning of the terms should be resolved against the Union.

ARGUMENT

THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT BY ASSESSING, AND SEEKING JUDICIAL ENFORCEMENT OF, A FINE AGAINST AN EMPLOYEE FOR WORKING DURING A STRIKE AFTER HIS RESIGNATION FROM THE UNION

In *National Labor Relations Board* v. *Granite State Joint Board*, No. 71–711, decided December 7, 1972, the Court reaffirmed its decision in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, that "a union did not violate § 8(b)(1) by fining members who went to work during a lawful strike authorized by the membership and by suing to collect the fines" (slip op., pp. 2–3). It held, however, that the union's authority to do is is defined by the contract between the union and its members and that, "[w]here a member lawfully resigns from a union and

thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct" (*id.* at 4). Finding no provision in the Union's constitution or bylaws limiting the circumstances under which a member may resign from the Union, the Court concluded that the members were free to resign at will, and that their right thereafter to return to work, during a strike which had commenced while they were members, was protected by Section 7 of the Act. Therefore, it ruled, the Union's imposition of court-collectible fines on the former members for such work violated Section 8(b)(1)(A).

We submit that the holding in *Granite State* requires that the decision of the court below be affirmed insofar as it sustains the Board's holding that the Union violated Section 8(b)(1)(A) by fining employees who resigned from the Union for work done after such resignation, and seeking judicial enforcement of such fines.[7]

1. The Board found (Pet. App. 40a, n. 11; A. 11), and the court below agreed (Pet. App. 19a), that the Union's constitution and bylaws in the instant case, like those in *Granite State,* contained no express provision limiting the circumstances under which a member could voluntarily resign from the Union. Although Union Representative Higgins testified (n. 6, *supra*) that a member could leave the union only

[7] The discussion in the Union's brief of the pre-*Granite State* opinions of this Court overlooks the explanation in that case of their applicability to the precise factual situation involved here and in *Granite State*. Compare slip op., pp. 2–4 with Br., pp. 74–77.

by falling in arrears in the payment of dues, by leaving the industry, or by death, the Union constitution and bylaws are simply silent on the subject of voluntary resignation. As in *Granite State*, there is no evidence here that the employees knew, or had consented to, any limitation on their right to resign during a strike.[8] Moreover, since the retention-of-membership provision of the collective agreement expired with the agreement, that provision imposed no obstacle to resignation from the Union during the strike (Pet. App. 19a).

Accordingly, here, no less than in *Granite State*, we have "only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated." *Granite State, slip op.*, pp. 3–4.

---

[8] Indeed, the employees' action in sending the letters of resignation indicates the contrary (A. 10, 61, 68–69, 71, 73–74, 89, 115–117, 128–129). Although Union Representative Higgins testified that it was the Union's position at that time that a member could not resign by letter, this opinion was not communicated to the letter-writers; the letters were simply ignored (A. 110–111).

The Union seems now to agree that the resignations were valid, and relies instead on the contention that former Union members have greater obligations to the Union during a strike called while they were members than persons who have never been members (Br. 57–59, 62, 78). This argument flies in the face of the statement in *Granite State* that "when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street" (slip op., p. 4).

2. The Union seeks to distinguish *Granite State* on the ground that, while the constitution here did not expressly restrict the right to resign during a strike, it contained a provision which the Union has interpreted as obligating a former member, notwithstanding his resignation, to refrain from abandoning any strike which was called while he was a member (Br. 57–58). But, as the Union acknowledges (Br. 61, 82), this provision— which defines "misconduct by a member" to include "[a]ccepting employment in any capacity in an establishment where a strike or lockout exists * * *" (A. 142–143)—is, on its face, only applicable to a member; it does not provide that the obligation to refrain from strikebreaking continues even after the member has resigned from the Union. Nor is there any indication that the Union, prior to bringing the instant charges against former members, ever informed its members that it interpreted that provision of its constitution as imposing such an obligation on a resignee. For example, when the employees wrote their resignation letters to the Union, the Union did not advise them that the constitutional provision against strikebreaking continued to be applicable notwithstanding their resignation (n. 8, *supra*).

Accordingly, the Union's argument that its constitution commits a member to adhere to a strike notwithstanding his midstrike resignation boils down to the contention (Br. 62, 69) that—since each member depends on every other member to withhold his labor from the struck employer in order to make the strike effective—the constitution should be interpreted as

impliedly imposing such an obligation.[9] Whether or not a constitutional or bylaw provision which expressly committed a member not to resign during a strike, or to adhere to a strike notwithstanding a mid-strike resignation, would be valid for purposes of Section 8 (b)(1)(A) of the Act,[10] *Granite State* shows that the mutual reliance considerations advanced by the Union do not warrant finding such a commitment by implication. This Court there rejected the union's contention, which the court of appeals had adopted (see 446 F. 2d 369, 372–373 (C.A. 1)), that, by participating in the strike vote and in ratifying the strike penalties, the resigning employees had made an implied commitment, which the other strikers had relied on, to stay with the strike until its conclusion. Instead, it concluded that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or

[9] That the Union, in September 1972, amended its constitution to provide explicitly that resignation shall not relieve a member of his obligation to refrain from working during an ongoing strike (Br. 58), does not justify reading a provision into the earlier constitution by implication. Indeed, the fact that the constitution was amended to add the provision is persuasive evidence that it was not there before.

In any event, a constitutional amendment made seven years after the strike here could hardly have apprised the employees of their obligation to the Union at that time.

[10] The Board has not yet had occasion to consider that question, nor did the court below (Pet. App. 20a, n. 20). Cf. *United Auto Workers (John I. Paulding, Inc.)*, 137 NLRB 901, enforcement denied, 320 F. 2d 12 (C.A. 1); *United Auto Workers (General Electric Co.)*, 197 NLRB No. 93, 80 LRRM 1411 (1972). See also *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 197, concurring opinion of White, J.

by its pressures for conformity and submission to its regime" (slip op., p. 5).

Contrary to the Union's contention (Br. 84–85), an important statutory policy is defeated by imposing, by implication, an obligation on a member to adhere to a strike even after he has resigned from the union. As the court below noted (Pet. App. 17a):

> Section 7 of the N.L.R.[A.] expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act. * * *

It is well settled that a contract waiver of a statutory right must be "clear and unmistakable"—"a mere inference, no matter how strong, [is] * * * insufficient." *National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488, 489 (C.A. 1); accord: *Int'l Telephone & Telegraph Corp.* v. *National Labor Relations Board*, 382 F. 2d 366, 373 (C.A. 3), certiorari denied, 389 U.S. 1039; *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971.

It is particularly appropriate that this principle be adhered to here, since the contract between a member and his Union is a "contract of adhesion," *i.e.*, "[t]he member has no choice as to terms but is compelled to adhere to the inflexible ones presented." Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1055 (1951). In view of the lack of negotiation over the terms of contracts of adhesion, where there is doubt as to the meaning of those terms, the doubt is resolved against the party who drafted the terms. 3 Corbin, *Contracts* § 559 (1960); 6A *id.*, § 1376; see generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*,

43 Colum. L. Rev. 629 (1943). Similarly here, where there is no clear indication in the Union's constitution or bylaws that the member has waived his right to refrain from engaging in union activities subsequent to his effective resignation from membership, those documents should not be construed as effecting such a waiver by implication.

Moreover, as the Court recognized in *Granite State*, "[e]vents occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident." Slip op., p. 4. A member should not be deemed to have given up his freedom to protect against these serious hardships unless, at least, there is clear evidence that he knowingly waived that right.

This analysis is not inconsistent with *Int'l Bro. of Boilermakers v. Hardeman*, 401 U.S. 233. This Court there held that "nothing in either the language or the legislative history of § 101(a)(5)" of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(5)—which provides that no member of a labor organization may be disciplined unless, *inter alia*, he has been "afforded a full and fair hearing"—authorized "a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members" (401 U.S. at 242–243). The Court's decision was based on the legislative history of that particular provision (*id.* at 243–245), and does not enunciate a general principle that is applicable to

other statutes as well. Moreover, in *Hardeman*, the conduct for which the member was disciplined—*i.e.*, assault on a union official—was not otherwise protected by statute; the only issue was whether it was proscribed by the Union's regulations. It is one thing to give the Union wide latitude to interpret its regulations in the latter situation; it is quite another matter to give it such authority where, as here, its interpretation affects an employee's Section 7 rights.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it sustains the Board's holding that the Union violated Section 8(b)(1)(A) of the Act by imposing court-collectible fines on employees who resigned from the Union for work done after such resignation.

Respectfully submitted.

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IN THE
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October Term, 1971

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE BOEING COMPANY

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 459 F.2d 1143 (Pet. App. 5a-33a).[1] The opinion of the National Labor Relations Board is reported at 185 NLRB No. 23 (Pet. App. 34a-46a). The decision of the Labor Board's Trial Examiner is reproduced at A. 2-47. A companion opinion of the National Labor Relations Board is reported as *International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504 (Arrow Development Co.) and David O'Reilly, An Individual*, 185 NLRB No. 22 (Pet. App. 47a-67a).[2]

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1972 (Pet. App. 1a-3a). Petitions for writs of certiorari were granted on December 18, 1972 (A. 205-6).

QUESTIONS PRESENTED

1. If a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, the reasonableness of the

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[1] "Pet. App." refers to the petition for a writ of certiorari of Booster Lodge No. 405 (i.e., the Union) in No. 71-1417. "A" refers to the separate appendix to the briefs.

[2] Remanded to Board, *sub nom., David O'Reilly v. N.L.R.B.*, ____ F.2d ____, 82 LRRM 2073 (C.A. 9, 1972), requiring that the Board determine the reasonableness of a fine. The reasoning in support of the remand is expressed in *Morton Salt Co. v. N.L.R.B.*, ____ F.2d ____, 82 LRRM 2066 (C.A. 9, 1972).

amount of the fine is a matter to be determined by the National Labor Relations Board.[3]

2. Whether, given a union constitution which prohibits a member from "[a]ccepting employment where a strike ... exists," a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.[4]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

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[3]This question was stated in different form by each petitioner. In No. 71-1417, the Union stated the question as follows: "Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking." In No. 71-1607, the Board presented the question as follows: "Whether the National Labor Relations Board, in determining whether a union committed an unfair labor practice by assessing and seeking court collection of a fine against a member for violating a union rule against strikebreaking, is required to determine whether the fine is reasonable in amount."

[4]The quesion here is as stated in the Petitioning Union's brief, page 2.

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

* * * *

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

STATEMENT

I. The Strike, The Fines And The Board's Findings Of Fact

The Boeing Company operates a plant at New Orleans, Louisiana, known as the Michoud plant (A. 3). The production and maintenance employees at this plant are represented by the Union and its parent, International Association of Machinists and Aerospace Workers, AFL-CIO. It is estimated that in September, 1965, approximately 6,000 employees were employed at Michoud, of which approximately 1500 to 1900 employees were in the unit represented by the Union (A. 3-4). A contract between the Union and The Boeing

Company was in effect from May, 1963 to September 5, 1965. The contract provided that unit employees who are members of the Union or who become members are required to maintain their membership as a condition of employment. Employees hired after the effective date of the contract who are not members of the Union have a specified period in which to give notice that they do not desire to become members of the Union. (A. 3-4).

Upon the expiration of the contract on September 5, 1965, the Union struck and picketed Boeing at Michoud and other locations. The strike ended on October , 1965, and a new contract was entered into. During the strike, certain employees who were in the contract unit at Michoud crossed the picket line and worked. Some of these employees resigned from the Union prior to returning to work. Another group of those members who returned to work during the strike made no effort to resign from the Union. Others resigned during the course of the strike, but returned to work before submitting their resignations. All resignations, however, were submitted after the expiration of the 1963-65 contract and before the signing of the new one, and all were submitted prior to the imposition of disciplinary actions by the Union. A. 4; Pet. App. 36a.

In late October or early November, 1965, the Union notified all employees who returned to work during the strike that charges had been preferred against them under the International Constitution for "Improper Conduct of a Member" in "accepting employment ... in an establishment where a strike ... exists."

Employees were advised of the dates of their trials, which were to be held even in their absence. Prior to the strike, the Union had not notified or warned members about the possible imposition of disciplinary measures. In fact, the Union had never before imposed disciplinary fines on any of the members for any reason. A. 4-5; Pet. App. 36a.

Fines were imposed on all employees who had returned to work during the strike, regardless of whether, or when, they had resigned from the Union. Those employees who did not appear at their trial were fined $450; those who appeared and were found guilty were also fined $450.[5] The fines of about thirty-five employees who appeared for trial, apologized and plead loyalty to the Union were reduced to fifty percent of the earnings they received during the strike. The Union sent out written notices to the fined employees that the matter had been referred to an attorney for collection, that suit would be filed if the fines remained unpaid, and that reduced fines would be reinstated to $450 in the event of nonpayment. The Union filed suit against at least nine employees to collect the fines (plus attorney's fees and interest). For instance, a citation dated April 11, 1966, shows the amount as $630 "with legal interest." The amount of $630 was based upon the $450 fine, plus $180 attorney's fees. A. 6-7; A. 134-5; Pet. App. 8a-9a.

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[5]There is no evidence that anyone was found not guilty. The disciplined employees were also barred from holding office for a period of five years. A. 6, ftn. 2.

On February 18, 1966, the Company filed a charge with the National Labor Relations Board, alleging that the Union had violated Section 8(b)(1) of the Act, and a complaint was issued by the Board's General Counsel. Pet. App. 9a-10a. The complaint alleged that the fines were unreasonable, excessive, and discriminatory. It further alleged that the Union levied fines against certain employees who had resigned from the Union prior to working during the strike and prior to being fined, and these fines were also alleged to be unreasonable, excessive, and discriminatory. A. 2.

A request was made to the Company by the Union that the employment of certain of the fined employees be terminated, and it was not until January 8, 1968, that the Union withdrew its request. A. 201-4. Additionally, on October 13, 1965, the Union published and issued to all employees its house organ, "The Space Travelers," wherein the Union stated that its mailing list is accurate and up-to-date for members only, and instructed the members to "pass your paper on to 'someone listed' and 'you know who,' so that they will know that WE KNOW." The reference to 'someone listed' is to two pages of names of employees who allegedly "crossed the picket line and/or wrote letters of termination of their membership" during the strike. The names appear under the following heading:

WE SHALL NOT FORGET!!

Also on page one, over the signature of the Union's Business Representative, the employees were told:

THE 10% WHO WORKED BEHIND THE LINES, COMMONLY CALLED SCABS, MUST HAVE A GUILTY CONSCIENCE TO ACCEPT THE GAINS WON BY OTHERS.[6]

The record shows that the Michoud plant was severely damaged by Hurricane Betsy and was closed for three or four days, reopening just a matter of a few days before the strike. Employees who worked during the strike were deprived of the benefits of the Union's hurricane relief fund.[7] A. 19-20. By letter or otherwise, there was no notification to the employees by the Union that it had reduced or would reduce the fines to fifty percent of earnings under some circumstances. A. 6. This alleged policy purportedly was instituted in the "first part" of 1966. *Ibid.*, n. 3.

The employees involved in the instant case normally earned approximately $2.38 to $3.63 per hour, which would mean a gross earning of approximately $95 and $145 per 40-hour week, respectively. A. 18.

At the time of the 1965 strike, the Union's Constitution and By-Laws contained no provisions for voluntary resignations from membership. It was the Union's position that the resignations were an exercise in futility and it regarded them as having no effect. A. 11. Ac-

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[6] A. 192-200.

[7] The Trial Examiner discredited Business Representative Higgins' claim that the Union did take the hurricane situation into consideration regarding the fines. A. 6-7.

cording to the Union, by action which postdated the events in this case, the International Constitution has been amended to provide that resignation shall not relieve a member of his obligation to refrain from accepting employment during a strike if the resignation occurs within the period of the strike or within 14 days preceding its commencement. Union's brief, page 58. But the contract between the Union and the employer binds the member to membership for the duration thereof. A. 154-8.

II. The Board's Decision And Order

The Union was alleged to have violated Section 8(b)(1)(A) of the Act by (1) fining its members an unreasonable and excessive amount for violation of the Union's rule against working for a struck employer and threatening to and initiating court action to collect same, and (2) fining in any amount those persons who had resigned from the Union for their activities subsequent to their resignation. A.2. The Labor Board's Trial Examiner sustained these allegations, and concluded that the fines levied against those employees who had been resigned from the Union were unreasonable. A. 43-47. The Trial Examiner devoted a considerable portion of his decision discussing how "reasonableness" should, in his opinion, be determined. A. 15-42.

The Board found that the Union's imposition of disciplinary fines upon individuals who had resigned from the Union before engaging in the conduct for which

the discipline was imposed violated Section 8(b)(1)(A) of the Act, regardless of the amount of the fine. Pet. App. 37a *et seq.*[8] The Board further found that the Union did not violate the Act by imposing disciplinary fines upon members who did not resign but worked during the strike, and that the Union did not violate the Act by fining former members for returning to work prior to their resignations, but that the imposition of discipline for conduct engaged in after their resignations was illegal. Pet. App. 42a-43a. The Board ordered the Union to cease and refrain from the conduct which it found to be violative of the Act, and to reimburse or refund to any employees who have paid fines levied against them for any conduct which occurred subsequent to their resignations. With regard to those employees who returned to work before resigning but who subsequently resigned, the Union was ordered to remit a prorata portion of the fine, so that what remained reflected only preresignation conduct. Pet. App. 43a-44a.

A majority of the Board found that the legality of the fines does not depend on their reasonableness, and did not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. Chairman McCulloch dissented in this regard; he would examine the amount of the fines to determine their reasonableness in those situations where the Union's imposition thereof and threatened or actual court action to collect

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[8]Member Brown dissented with regard to this finding. Pet. App. 45a-46a.

such fines would in all other respects be lawful. (Where expulsion from membership is clearly the only available method of enforcement, he would consider the size of the fine irrelevant). Pet. App. 42a, n. 16. In so holding, the Board relied upon *Arrow Development Corp.*, 185 NLRB No. 22,[9] issued on the same day as the decision and order in the instant case. *Ibid.* In that case, the majority concluded that Congress did not intend to have the Board regulate the size of fines and establish standards with respect to their reasonableness. Pet. App. 55a, *et seq.* Chairman McCulloch's full dissent is at Pet. App. 58a-67a.

In two cases, the United States Court of Appeals for the Ninth Circuit has reversed the Board majority on this question, and it has remanded those cases to the Board. *David O'Reilly v. N.L.R.B., supra; Morton Salt Co. v. N.L.R.B., supra.*[10]

III. The Decision Of The Court Of Appeals

The Court of Appeals for the District of Columbia Circuit agreed with the Board that the Union acted within the sphere of its lawful authority in imposing fines on the members who did not resign from the Union before returning to work (Pet. App. 13a), that the Union did not violate Section 8(b)(1)(A) so far as its

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[9] *International Association of Machinists And Aerospace Workers, AFL-CIO (Arrow Development Co. and David O'Reilly, An Individual)*, Case No. 20-CB-1947. Pet. App. 47a, et seq. See footnote 2, *supra*.

[10] See footnote 2, *supra*.

imposition of disciplinary fines concerned the pre-resignation conduct of those employees who returned to work and then resigned (Pet. App. 15a), and that the Union violated the Act by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' post-resignation conduct in working during the strike (Pet. App. 21a).

The Court unanimously refused to accept the Board's majority conclusion that Congress did not intend to empower the Board with the authority to examine the severity of Union discipline when ascertaining its legality, and remanded the case to the Board for further proceedings. Pet. App. 22a-23a. In so doing, the Court stated (Pet. App. 25a):

> Since the imposition of an unreasonably excessive fine is violative of Section 8(b)(1)(A), it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised. * * *

The Court proceeded to set forth reasons why the Labor Board should determine the question of reasonableness, and enumerated a number of factors which it felt the Board could and should consider in resolving the question. Pet. App. 26a-30a.

SUMMARY OF ARGUMENT

I.

The Court of Appeals, in agreement with the Board, correctly affirmed the conclusion that "the Union violated Section 8(b)(1)(A) by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage." The imposition of fines under such circumstances was held to violate the policies underlying the National Labor Relations Act and has effects outside the area of internal union affairs, and therefore they are clearly coercive within the meaning of Section 8(b)(1)(A).[11]

It is only by virtue of the membership relationship that the union has any authority over the employee-member. Thus, when the membership relationship ceases to exist, so does the union's authority to take disciplinary actions. The sanctions allowed by the Court in *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), were against those who enjoyed full union membership. Even then, for the union's rule to be valid and enforceable, the members must be free to leave the union and escape the rule. *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969)

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[11]Pet. App. 21a.

The employees here had no obligation to continue their membership in the Union when the 1963-65 contract expired. Pet. App. 20a-21a. Thus, having relinquished their membership, they were free to "refrain from engaging in any and all concerted activities," including observance of the Union's picket line. See Section 7 of the Act, page 3, *supra*.

Contrary to the Union's assertion, there is no continued duty, implied or otherwise, on the former member to refrain from returning to work subsequent to his resignation. The Union would have the Court supply a contractual or other obligation where none exists. All resignations in question here were submitted after the expiration of the 1963-65 contract, and before the execution of the new agreement, and all were submitted prior to the imposition of any Union discipline, or threats or warnings. Pet. App. 7a. The Union's Constitution and By-Laws make no reference to resignations.

The subsequent insertion into the Union's Constitution of a provision purportedly prohibiting members from accepting employment at the struck establishment,[12] effective over seven years after the Michoud strike had ended, can have no effect here. Heretofore, the Constitution was silent with regard to resignations and the Union took the position that its members could not resign, except "by death." Moreover, the newly-added provision contravenes the pur-

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[12]Union's brief, page 58.

poses and policies of the Act, particularly Section 7 thereof, for, as a practical matter (considering the union security language of the contract), this provision will prevent any employee from being able to resign at *any* time, including during strike situations. Events occuring after a strike is called may have the effect, moreover, of changing conditions in such a manner that even if the employee were bound initially to join in the strike he should no longer be so bound. Additionally, it has the effect of "locking in" members who may not wish to strike at all, and prohibiting them from resigning from the union and exercising their rights under Section 7 of the Act.

The decisions of this Court demonstrate that in applying Section 8(b)(1)(A), the Board is required to make an accommodation between the right of a union to protect against erosion of its status as exclusive bargaining representative through reasonable discipline of members who violate valid rules governing membership, and the right of employees, conferred by Section 7, to refrain from engaging in union activity. They further indicate that the union's right of discipline flows from the fact that, in joining the union, the member agrees to abide by lawful union rules and policies, and that a member may escape the discipline by leaving the union.

The very fact that a worker gives up so much freedom of action in joining a union supports the conclusion that he must ultimately have the right to leave the union if he finds some aspect of its regulations intolerable. The Board was reasonable and correct in con-

cluding that the members had a right to resign from the Union and that the Union's right of discipline was coterminous with the union-member relationship.

The contention of the Union[13] and of the AFL-CIO[14] that because of the Union's prohibition against members working for a struck employer the members have thus by specific commitment mutually promised each other to refrain from strikebreaking, notwithstanding resignations, is not tenable, and contrary to the provisions of Section 7 of the Act and to this Court's decisions. See *Scofield, supra*, page 13 and *Granite State, infra*, page 20. The qualification of Section 7 rights sought by the Union and the AFL-CIO would seriously curtail employees' Section 7 rights to refrain from engaging in union activity. Even where a member's support of any rule or policy, such as increased dues or assessments, may actually be shown, such support may be viewed as a waiver of any right to oppose the rule, but it can hardly be viewed as a commitment to remain a member or support the rule (e.g., pay dues) after he has resigned. Support at one time of a particular union project may not be construed in derogation of Section 7 rights, so as to commit a member irrevocably to union membership or to support of a union rule once he has left the union.

Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct.

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[13]Union's brief, pages 58-59.

[14]Amicus curiae brief, pages 16-17.

II.

The Board contends that it has no authority to determine the reasonableness of an otherwise lawfully imposed fine by a union upon its members. It also argues that Section 8(b)(1)(A) of the Act does not *require* the Board to determine whether a judicially enforceable union fine imposed upon a member for breach of a valid union rule is reasonable in amount.[15]

Contrary to the contentions of the Board, the Union and the AFL-CIO,[16] in order for an otherwise valid union fine to be legal under Section 8(b)(1)(A), it must be reasonable in amount or size, and the Labor Board not only is empowered to determine the question of reasonableness, but it is the proper forum for doing so.

The Court of Appeals for the District of Columbia Circuit specifically stated that the Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8(b)(1)(A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions. Pet. App. 23a. The decisions of the Supreme Court, in *Allis-Chalmers*, and *Scofield*, *supra*, make it clear that the reasonableness of the fine must be determined before the legality of the fine, under Section 8(b)(1)(A), can be determined.

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[15]Board's brief in No. 71-1607, page 8.
[16]Amicus Curiae brief, page 2, et seq.

The position of the Board on this question is inconsistent with the preemption doctrine. See *San Diego Building Trades Council v. Garmon, infra* at page 41. As the court below noted, the possible existence of a concurrent state court remedy does not relieve the Board of its duty to adjudicate the remedy of unfair labor practices under the Act. The state courts are reluctant to become embroiled in such matters, and there is a compelling need for national uniformity and guidance in such matters. Pet. App. 25a-27a. Moreover, the Board is not without expertise in related areas. It has long been called upon, under Section 8(b)(5) of the Act, to determine whether initiation fees required by a labor organization are excessive. See *Radio & Studio Employees Union, infra*, at page 40. The fact that Section 8(b)(1)(A) does not provide the Board with specific standards to be applied in determining the reasonableness of a union fine, while Section 8(b)(5) does include some express standards, does not detract from the Board's authority and responsibility under Section 8(b)(1)(A). "Experience and common sense will supply the grounds for the performance of this job." *N.L.R.B. v. Radio and Television Engineers Union, infra*, page 39.[17]

A fine imposed for the violation of a union rule should be viewed with close scrutiny. Such fines should be permitted only when needed for protection of legitimate union interests. If the amount of the fine is in-

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[17]364 U.S. at 583.

ordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed upon the member, not in vindication of a legitimate union interest, but rather as a reprisal for having exercised a statutorily protected right. Pet. App. 29a.

The Board's contention that for it to determine the reasonableness of the amount or size of union imposed fines would require it to protrude itself into the internal affairs of a union which was not contemplated by Congress either in the Taft-Hartley Act or in the Labor-Management Reporting and Disclosure Act not only is without merit but it is contrary to the Board's own decisions. The Board has stated that the Department of Labor is directly responsible for the administration of the Labor-Management Reporting and Disclosure Act, but that in determining the legality of union fines, the Board is charged with "considering the full panoply of congressional labor policies.'" *Carpenters Local Union No. 22 (Graziano Construction Company)*, 195 NLRB No. 5, 79 LRRM 1194 (1972)). In that case, the Board recognized and decided that a union may not, under the guise of enforcing internal discipline, deprive members of rights guaranteed under the Labor-Management Reporting and Disclosure Act to participate fully and freely in the internal affairs of their union.

It is the Board, and not the state courts, which has been entrusted to determine the true motivation of employers and unions alike in taking disciplinary actions against employees. The Board has developed that par-

ticular expertise in resolving issues under Sections 8(a)(3) and 8(b)(2) of the Act. The same expertise should be applied in determining the reasonableness of otherwise valid union fines.

ARGUMENT

I. A Union Violates Section 8(b)(1)(A) Of The National Labor Relations Act By Fining Employees Who Resigned From Union Membership And Returned To Work During A Lawful Union-Authorized Strike, And By Seeking Judicial Enforcement Of The Fines.

In *N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, AFL-CIO,* 93 S.Ct. 385 (1972), the Court held that, where neither the contract nor the Union's constitution or by-laws contained any provision defining or limiting the circumstances under which a member could resign, a member is free to resign from his union during the course of a strike and then return to work without incurring the liability of a court-collectible fine imposed by the union to discipline him for his post-resignation return to work. The Court did not consider an initial membership vote to strike, or a later membership resolution subjecting any member aiding or abetting the employer during the strike to a $2,000 fine, to suffice as a restriction on resignation.

As the Union points out,[18] the Court did state, "We

[18]Union's brief, page 57.

do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign. But where, as here, there are no restraints on the resignation of members, we conclude that the vitality of Section 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." (93 S.Ct., at 387; footnote omitted).

Contrary to the Union's assertion, however, the question purportedly reserved in *Granite State* is *not* presented in this case. Here, the Union's constitution and by-laws made no provision for resignation from membership, and the resignations were submitted subsequent to the expiration of the old collective bargaining agreement and prior to the execution of the new one, and prior to any disciplinary action being taken or threats of same by the Union.

A. Joining the Issue

The Board holds, with court approval, that in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him from any obligation he may have had to refrain from returning to work during the strike, after his resignation. The Board reasoned that in joining a union, the individual member becomes a party to a contract-constitution, and in so doing, without waiving his Section 7 right to refrain from concerted activities, he consents to the

possible imposition of union discipline upon his exercise of that right. But, the Board reasons, "(T)he contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for that duty are extinguished." Pet. App. 39a-40a.

The Union contends, however, that the issue before the Court is the interpretation of the *post resignation* breach of a union rule against working for a struck employer.[19] The question here is no different from the one submitted to the Court in *Granite State, supra;* i.e., "Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act by fining employees who resigned from union membership and then returned to work during a lawful union-authorized strike, and by seeking judicial enforcement of the fines."[20]

B. The Decisions Of The Courts Make It Clear That Members Are Free To Resign From A Union And Escape The Imposition Of Union Discipline For Post-Resignation Conduct.

We submit that the jurisprudence supports the opinions of the Board and the Court of Appeals for the

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[19]Union's brief, page 62.

[20]N.L.R.B. petition for writ of certiorari, *N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, October Term, 1971, No. 71-711, at page 2.

District of Columbia Circuit that, absent possible other considerations not present here, employee-members are free to resign from a union and escape imposition of union discipline for their post-resignation conduct. In such situations, the "internal affairs" of a union are no longer involved, and unions may not, by their constitutions or otherwise, infringe upon the Section 7 rights of the employees.

Local 1255, International Association of Machinists And Aerospace Workers, AFL-CIO v. N.L.R.B., 456 F.2d 1214, C.A. 5, 1972, is not to the contrary. There, the court merely held that a union member who resigns during a strike and crosses his union's picket line to return to work may be fined by the union for his post resignation strikebreaking, when the fine is enforceable only by explusion from the union. More accurately, the Court held that the "thrust of the penalty was to recondition readmission to membership on the payment of the fine,"[21] a matter reserved to the union under the proviso of Section 8(b)(1)(A).

The Court's decision in *Allis-Chalmers Mfg. Co., supra*, does not support the Union's position. To the contrary, there the Court was not presented with the issue of resignations. In the decisions of the Board and of the Court of Appeals for the District of Columbia Circuit, the Union's right to fine a member for crossing a picket line was recognized, but it was held that the union's right to do so is extinguished by the member's effective resignation from the union before crossing the picket line.

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[21]456 F.2d at 1217.

In the *Scofield* case, *supra*, the Court held that a union did not violate Section 8(b)(1)(A) by fining employees who exceeded a production quota established by union rule and acquiesced in by the employer. The Court reasoned that "Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" 394 U.S. at 430; emphasis supplied.[22]

These decisions make clear that, in applying Section 8(b)(1)(A), the Board is required to make an accomodation between the right of a union "to protection against erosion of its status [as exclusive bargaining representative] through reasonable discipline of members who violate rules and regulations governing membership" (*Allis-Chalmers, supra*, 388 U.S. at 181), and the right of employees, conferred by Section 7, "to refrain from" engaging in union activity. They further indicate that the union's right of discipline flows from the fact that, in joining the union, the member agrees to abide by lawful union rules and policies, and that a member may escape the discipline by leaving the union.

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[22]The Court added: "If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change that Rule, then he may leave the union and obtain whatever benefits in job advancements and extra pay may result from extra work, at the same time enjoying the protection from competition, the high piece rate, and the job security which compliance with the union rule by union members tends to provide." 394 U.S. at 435.

The very fact that a worker gives up so much freedom of action by joining a union (*Allis-Chalmers, supra*, 388 U.S. at 180) supports the conclusion of *Scofield, supra*, that he must ultimately have the right to leave the union if he finds some aspect of its regulations intolerable. In this case, as in *Granite State Joint Board, supra*, the union's constitution and by-laws contained no restriction on members' rights to resign and the retention of membership provision of the collective bargaining agreement had expired with the agreement.

The Board correctly noted (Pet. App. 40a):

> The holding in *Allis-Chalmers* was carefully restricted to the facts of that case. The Court expressly refused to pass on the legality of the imposition of a fine upon 'limited members' of the Union. It appears to us that in this reservation there is implication that such a fine when levied against non-members constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A). The decisions in two subsequent cases reinforce that implication. (Footnotes omitted).

No employee is subject to union rules if he chooses to forego the privileges and duties of union membership. Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 190 (1969). As stated by the Court of Appeals below (Pet. App. 15a, n. 10):

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> Since unions are only authorized to impose discipline where legitimate *internal affairs* are concerned (citations omitted), it is clear that any effort to fine nonmembers would constitute an attempt to affect *external activities*, an area in which Congress did not intend to permit such union regulation.

The Court's opinion in *Granite State, supra*, disposes of any issue here. There, the Court expressly stated (93 S.Ct., at 387):

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. *That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.* (Emphasis supplied).

It appears that the foregoing language, after comparing the facts in *Granite State* and the facts in the instant case, squarely disposes of the second question presented by the Union in No. 71-1417. The arguments of the Union in its brief (p. 57 *et seq*) to the contrary merely beg the issue, rather than join it. The question assertedly reserved in *Granite State* is not presented in this case. Here, neither the contract nor the Union's

constitution nor its by-laws defined or limited the circumstances under which a member could resign. In fact, it was the position of the Union that its members could resign only "by death." A. 11 Moreover, in *Granite State*, there was evidence that all of the resigning members against whom fines had been levied had participated in the vote to strike (93 S.Ct., at 387); no such evidence is present in the subject case.[23]

In its amicus curiae brief, even the AFL-CIO takes the position that the Board is empowered to preclude discipline of non-members (AFL-CIO brief, pages 7-8). The AFL-CIO states (Brief, page 8):

> ... Section 8(b)(1)(A), as it has been interpreted thus far, interdicts 'external' means of enforcement, measures union rules against external standards embodied in the NLRA, *and prohibits the imposition of union sanctions against non-members, i.e., individuals external to the organization.* (Emphasis supplied).

Moreover, since the collective bargaining agreement here provided that once an employee becomes a member he retains his membership only for the life of the contract term (Pet. App. 7a), it may well be argued that resignations were not necessary and that any membership obligations which may have existed were extinguished upon the expiration of the collective bar-

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[23]Cf. concurring opinion of the Chief Justice, 93 S.Ct. at 388.

gaining agreement. Accordingly, the decision of the Board and the Court below, that the employee-members were free to resign and escape the imposition of union discipline for post-resignation conduct, is reasonable and correct.

C. There Are No Facts Present Here Which Permit The Union To Discipline Former Members For Their Post-Resignation Conduct, And The Union May Not Now Impose Requirements Which Subject Employees To Union Discipline For Their Post-Resignation Activities.

1. The *Granite State* case, *supra*, p. 20, presented the court with an excellent opportunity to conclude that notwithstanding the absence of a provision in the union's constitution and by-laws or in the collective bargaining agreement regulating the rights of members to resign their membership, there were other considerations and factors present which deprived members of their right to do so. In fact, the Court of Appeals for the First Circuit had so held. Nevertheless, the Court held to the proposition that where there were no such provisions, members were free to resign at will and that the union no longer had any right to attempt to impose disciplinary fines upon them.

2. No factors to the contrary are present here. Moreover, a union may not, by constitutional amendments or otherwise, abridge the Section 7 rights of employee members to resign and to refrain from engag-

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ing in concerted activities, including prohibiting the employee from resigning his membership and returning to work during a strike. Regardless of any provisions which a union may attempt to impose, employees may continue to resign their membership and remain free from union disciplinary action, such as fines, for exercising their statutory rights.

3. The Union here would have the Court read into the restrictions as they existed in 1965 other obligations purportedly imposed on its members by constitutional amendments in 1972, effective January 1, 1973.[24] However, the purported amendment is patently invalid and illegal, regardless of when it was adopted; even if it were not, it could not be applied retroactively.

The facts demonstrate that if the purported amendment were to be given effect, it would, as a practical matter, deprive employee-members of the right to resign from the Union at any time, because (a) the amendment binds him to the union rules *during* a strike and (b) he is bound to membership during the life of the contract. A. 154-8. According to the Union's argument, at no time could a member resign until the strike ended following the 1963-65 agreement, and he could not do so even then because the new contract did not provide him with the opportunity to escape the future obligations of membership.

A Union may not, under the guise of prescribing "its own rules with respect to the acquisition or retention

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[24]Union's brief, pages 58-59.

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of membership therein,"[25] contravene either the express provisions or the purposes of the Act by denying to employees the right to refrain from union membership or from other protected or concerted activities.

4. Once a member has effectively resigned, the union may not discipline him for his post-resignation conduct by attempting to impose fines upon him and attempting or threatening to collect those fines, or by any other means of discipline. ". . .(W)hen a member lawfully resigns from the union, its power over him ends." *Granite State Joint Board, supra*, p. 20 (93 S.Ct., at 386).

II. The Board Is Empowered And Required To Determine The Reasonableness Of A Fine Imposed Upon A Member By A Union For Accepting Work During A Strike In Breach Of A Valid Union Rule, And It Must Do So If The Fine Is To Be Collectible.

In *Allis-Chalmers Mfg. Co., supra*, p. 13, a majority of the Court ruled that a union can, without violating Section 8(b)(1)(A) of the Act, obtain judicial enforcement of *reasonable* fines against its members who crossed a picket line in violation of a valid union rule. Subsequently, the Court stressed the implication of *Allis-Chalmers* that a disenchanted member may resign to avoid any rule he considers against his best interest. *Scofield, supra*, page 13. On December 18, 1972, in No. 71-1563; *The Boeing Company v. National Labor*

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[25]Section 8(b)(1)(A).

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Relations Board and Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, ___ U.S. ___, the Court declined to reverse its decision in *Allis-Chalmers, supra*, holding that members may escape the disciplinary fines of a union by resigning from it, but those who remain members are subject to *reasonable* fines for violation of valid union rules. The Board is the proper forum for determining the question of reasonableness. The Court below,[26] and Court of Appeals for the Ninth Circuit[27] agree.

A. In Order For An Otherwise Legal Fine To Be Enforceable, The Amount Of The Fine Must Be Reasonable.

In *Allis-Chalmers*, the Court stated (388 U.S. at 183):

> It is no answer that the proviso to Section 8(b)(1)(A) preserves to the Union the power to expel the offending member. Where the Union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty than a *reasonable fine*. (Emphasis added).

The Court further recognized that "the proviso preserves the right of unions to impose fines, *as a lesser penalty than expulsion* ..." 388 U.S. at 191-2 (Empha-

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[26]Pet. App. 23a-25a.
[27]See ftn. 2, *supra*.

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sis supplied).[28] This implicitly recognized that, for a disciplinary fine to be less coercive than expulsion from the union, the fine imposed must be a *reasonable* one, for it is intuitively obvious that enforcement of a grossly excessive fine might visit a far greater burden upon an individual than would expulsion.[29]

In reaching its decision, the Court evaluated the position of unions as the bargaining representative of collective bodies of workers and their needs in this position, and weighed these considerations against the challenge to *any* interference with employees' Section 7 rights. The Court found that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ."[30] From an appreciation of the inter-

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[28]Mr. Justice White, in his concurring opinion, observed:

> [S]ince expulsion would in many cases — certainly in this one involving a strong union — be a far more coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of Section 7 rights, nevertheless intended to bar enforcement by another method [court action] which may be far less coercive.

388 U.S. at 198 (emphasis supplied). It is also informative to note the express interpretation given to the *Allis-Chalmers* opinion by the dissenting members of the Court: [T]he Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike.' 388 U.S. at 200-201 (dissenting opinion of Black, J.) (emphasis supplied).

[29]See Pet. App. 24a-25a.

[30]388 U.S. 175, 180, quoting *Steele v. Louisville and N.R. Company*, 323 U.S. 192, 202.

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play of the Section 7 right to refrain from collective activity and the Section 8(b)(1)(A) prohibition on union interference with this right, as well as the legislative history of Section 8(b)(1)(A), the Court concluded that the "imprecise"[31] terminology, "restrain or coerce," of Section 8(b)(1)(A) was not meant to prohibit absolutely union imposition of fines. Rather, the Court held that *reasonable fines* are not a type of restraint or coercion prohibited by Section 8(b)(1)(A).[32]

The Court's decision in *Allis-Chalmers* thus confirmed the ability of unions to assess *reasonable* fines for strike-breaking, and outlined the interpretative framework in which analysis of union disciplinary action must take place. This reconciliation of the rights and obligations of union members under the Act was refined much further in the *Scofield* case. The issue before the Court there was the legality of union fines assessed against employees who disregarded a union rule setting a ceiling on daily pay for piece work performed for the Wisconsin Motor Corporation.[33] The Court considered the propriety of union fines as a disciplinary device and reaffirmed its *Allis-Chalmers*

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[31]388 U.S. 192, 202.

[32]The Court, in *Allis-Chalmers*, chose to consider the overall scheme of the Act and to balance the needs of labor unions against the assertion of an absolute right of freedom of action on the part of union members. The Court did not adopt the Board's reasoning that the union's action was privileged by the Section 8(b)(1)(A) proviso: "Our conclusion that Section 8(b)(1)(A) does not prohibit the locals' action makes it unnecessary to pass on the Board holding that the proviso protected such actions." 388 U.S., at 192, n. 29.

[33]See the statement of facts set forth by the Trial Examiner in *Wisconsin Motor Corp.*, 145 NLRB 1097 (1964).

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decision that "[a] union rule, duly adopted and *not the arbitrary fiat of a union officer*, forbidding the crossing of a picket line during a strike was therefore enforceable against *voluntary union members* by expulsion or a *reasonable fine*." 394 U.S., at 428 (emphasis added). The Court expressly recognized that the enforcement of a proper union rule "by *reasonable fines* does not constitute the restraint or coercion proscribed by Section 8(b)(1)(A)." 395 U.S., at 436 (emphasis supplied).

The Supreme Court's decisions in *Allis-Chalmers* and *Scofield* established the following standards, each of which must be met if a union's disciplinary action against a member imposed because of the member's exercise of his Section 7 rights is to escape the prohibition of Section 8(b)(1)(A) of the Act:[34]

(1) The fine must be reasonable;
(2) The fine must not be the mere fiat of a union leader;
(3) The members fined must be free to leave the union;
(4) The means used to enforce a rule must be acceptable;
(5) The rule must be supported by a legitimate union interest;
(6) The rule must not violate federal labor law policies.

A negative answer to any of these issues removes the union action from the protection of *Allis-Chalmers* and *Scofield*, and makes it a violation of Section 8(b)

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[34] *Scofield*, 394 U.S., at 430-1.

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(1)(A). The facts here show that the first three standards were not met. The Trial Examiner found that the fines were unreasonable in amount. Union fiat was also present in the treatment of the fined employees; the amount was determined before any hearing and the fine was imposed regardless of a member's knowledge or lack thereof of the rule, notwithstanding the fact that they were not warned in advance that such disciplinary action would or might be taken against them, and the Union had never previously imposed disciplinary fines on any of its members. The Union admits that employees fined were involuntary members because, according to the Union, it is impossible to resign from its membership.

The Court below, after reviewing *Allis-Chalmers* and *Scofield*, concluded (Pet. App. 25a):

> * * * In light of the Court's emphasis on the requirement of 'reasonable fines' if a union is to avoid a violation of the Act in these circumstances, we must conclude that the imposition of an unreasonably large fine, at least where the union threatens or actually attempts court enforcement of the fine, may be coercive and restraining within the meaning of section 8(b)(1)(A).
>
> Since the imposition of an unreasonably excessive disciplinary fine is a violation of Section 8(b)(1)(A), *it is clearly the obligation of the National Labor Relations Board to resolve the question where such an issue is appropriately raised.* (Emphasis supplied).

In the *Morton Salt Co.* case, *supra* (82 LRRM at 2066)[35] the Court of Appeals, after reviewing *Allis-Chalmers* and *Scofield,* stated:

> While, again, the issue was not squarely presented to the Supreme Court, we particularly note the adjective 'reasonable' in the above-quoted portion of the [Scofield] opinion used in the context of enforceability and legality of the fine. The corrollary of this Scofield conclusion is that *an unreasonable fine is an unfair labor practice.* (Emphasis supplied; citations omitted).

After citing, with approval, the decision of the Court below herein, the Court of Appeals for the Ninth Circuit said, "We agree that the *lawfulness* of fines imposed depends, in part, *upon the reasonableness of the amount* . . ." 82 LRRM at 2071. (Emphasis supplied). The Trial Examiner who heard the instant case, after reviewing *Allis-Chalmers*[36], stated (A.13):

> We proceed, therefore, on the basis, as indicated by the Court, that under the body of Section 8(b)(1)(A) the fine imposed and enforced or sought to be enforced must be 'reasonable.'

Chairman McCulloch, dissenting in the *O'Reilly* case,[37] noted that the dissenting opinion in *Allis-Chalmers* interprets the Court's holding as limited in its scope to "a court enforced reasonable fine," citing

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[35]See ftn. 2, *supra*
[36]His decision issued before that of the Court in *Scofield.*
[37]See ftn. 2, *supra*; *O'Reilly v. N.L.R.B.*

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388 U.S. at 200. (Pet. App. 60a). He further expressed his dissent as follows (Pet. App. 61a-65a):

> The Court's repeated use of the adjective 'reasonable' in both *Allis-Chalmers* and *Scofield* to describe the fines there in issue cannot be passed over casually as without significance. By its carefully drawn distinction between 'reasonable' and 'unreasonable' fines, the Court, it seems to me, meant not only to define the limits of its holdings in these cases, but also to indicate affirmatively that it regarded court-collectible fines which were unreasonable, either in their nature or size, as not serving a legitimate union interest, and therefore not privileged from the proscription of Section 8(b)(1)(A).

B. The Court Below Properly Remanded The Case To The Board With Directions That The Board Determine The Questions Relating To The Reasonableness Of The Fines Imposed By The Union.

In the decision the Board, relying upon its own decision in *International Association of Machinists And Aerospace Workers, AFL-CIO, Local Lodge No. 504 (Arrow Development Co.), supra*[38] concluded that "the Act does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest." Pet. App. 42a, n. 16. The Court of Appeals for the District of Columbia Circuit, how-

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[38]See ftn. 2, *supra*. Remanded to Board, *sub. nom. O'Reilly v. N.L.R.B.*

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ever, disagreed, and remanded the instant case to the Board for further consideration of the question relating to the reasonableness of fines imposed by the Union. Pet. App. 33a.

The Court below observed (Pet. App. 26a-27a):

> ... (T)he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .' * * * Furthermore, the fact that some state courts might not permit enforcement of excessive fines in a collection action by the union, does not detract from their coerciveness, or need for N.L.R.B. action. * * * (Footnotes and citations omitted).

The Court further stated, after rejecting the Board's "reverse preemption" argument, that it was emphasizing the fact that "(t)he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board," citing *N.L.R.B. v. Truck Drivers Union*, 358 U.S. 87, 96 (1957), and added: "This is the very function which the Board is being asked to perform here."[39]

In *Morton Salt*[40], the Ninth Circuit Court, after agreeing with the District of Columbia Circuit Court, stated

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[39]Pet. App. 28a, n. 34.
[40]See ftn. 2, *supra*.

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that an unreasonable fine is an unfair labor practice, (82 LRRM at 2070):

> A statutory responsibility of the Board is to adjudicate and remedy unfair labor practices. N.L.R.A. Section 10(a); 29 U.S.C. Sec. 160 (a). *We conclude that the determination of reasonableness is for the Board.* (Emphasis supplied).

And at 81 LRRM 2071, the Court stated, "We agree that the lawfulness of fines imposed depends, in part, upon the reasonableness of the amount, *and that the N.L.R.B. is the proper forum for this determination.*" (Emphasis added).

1. The Board's argument that the Act does not "require" it to determine whether a fine imposed on a union member for breach of valid union rule is reasonable in amount does not meet the question presented. The Board advanced the same argument when it took the position that it was not authorized, empowered or required to award assignments of work in jurisdictional dispute cases under Sections 8(b)(4)(D) and 10(k) of the Act. The Supreme Court rejected that position in *N.L.R.B. v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573 (1961), noting that "the Board need not disclaim the power given it for lack of standards."[41] Since that decision, the Board has developed "standards" for making affirmative awards in jurisdictional disputes which it applies uniformly, and which provide parties to such disputes with uniform guidance in the resolution or litigation of same. See, e.g., *IBEW Local 743*, 185 NLRB No. 106,

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[41] 364 U.S. at 583.

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75 LRRM 1164 (1970). The Board's expertise in interpreting Section 8(b)(5) of the Act is also of value to the Board in determining the reasonableness of such fines. The Board has exercised its experience in this area and, fairly recently, concluded that a union violated Section 8(b)(5) by imposing excessive initiation fees which restrained and coerced employees in their right to join a union. In so doing, the Board pointed to such factors as the fee being six times greater than the weekly wage of employees belonging to the union, and that it was twice as large as that of the union's sister local. *Longshoremen, I.L.A. Local 1419*, 186 NLRB No. 94, 75 LRRM 1411 (1970).[42]

Although Congress set forth broad, general prohibitions against illegal secondary activities by unions in Section 8(b)(4) of the Act, it has been the Board itself which has refined and interpreted the prohibitions, and it has been the Board which has established "standards" thereunder for regulating secondary picketing. For instance, the Act itself makes no reference to "common-situs" picketing. Yet, the Board has developed guidelines and standards for such situations.[43]

The court below recognized the fallacies of the Board's contention[44], as did the Board's dissenting member, then Chairman McCulloch. See Pet. App. 65a.

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[42]See also *N.L.R.B. v. Television & Radio Broadcasting Studio Employees*, 315 F.2d 398, C.A. 3, 1963.

[43]See, e.g., *Sailors Union of the Pacific (Moore Dry Dock Co., Inc.)*, 92 NLRB 547 (1950); *Electrical Workers Local 1761 v. N.L.R.B.*, 366 U.S. 667 (1961); *Brewery & Beverage Drivers Local 67 (Washington Coca-Cola Bottling Co.)*, 107 NLRB 299 (1953); and *Electric Workers Local 861 (Plauche Electric Co.*, 135 NLR 250 (1962).

[44]See Pet. App. 23a; 25a; 28a-29a.

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2. The Board's position as stated in *Carpenters, Local 22, supra*, is more in conformity with the congressional and judicial scheme of administration of labor laws and policies than is the position being taken by the Board in the present case; i.e., that it may not pass on the reasonableness of these fines. It was the purpose of Congress in establishing the Board to have *one* agency for the adjudication of issues arising from labor disputes.[45] Only recently, the Supreme Court has reaffirmed the "primary responsibility" of the NLRB for guiding the development of national labor policy.[46] To support the Board's preeminent position in the scheme of national labor policy, the Supreme Court in *San Diego Building Trades Council v. Garmon*,[47] and other cases, set forth the preemption doctrine.

> When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to averted.[48]

In such situations, the "power and duty of primary decision lies with the Board," rather than with one

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[45] *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938); *Amalgamated Utility Workers v. Consolidated Edison of New York*, 309 U.S. 261 (1940).

[46] *N.L.R.B. v. Raytheon Company*, 398 U.S. 25, 28 (1970).

[47] 359 U.S. 236 (1959).

[48] 359 U.S. 236, 245. Accord, *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Company*, 397 U.S. 195, 200 (1970).

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or several other tribunals, for the sensible reason that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[49] Congressional concern for a coherent national labor policy naturally manifests itself in a corollary interest in "uniform application of its substantive rules [avoiding] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies."[50]

3. The question of the "reasonableness" of a court-collectible fine is not one relating to the "internal affairs" of a union. The fact, alone, that the Union attempted to impose fines upon employees, and threatened or attempted enforcement of such fines against employees because of their post-resignation conduct, particularly when coupled with the Union's insistence that its members may not resign during the course of a strike and therefore they remained subject to the Union's disciplinary actions, had effects outside the area of internal union affairs, and clearly fall within the purview of the Board in interpreting and applying Section 8(b)(1)(A) of the Act. Pet. App. 21a-22a.

Moreover, inasmuch as the imposition of an *unreasonable* fine is coercive, *per se*, the proviso to Section 8(b)(1)(A) is not applicable. See also Pet. App. 29a-30a.

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[49] *Garner v. Teamsters Union*, 347 U.S. 485, 489, 490-91 (1953).

[50] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490.

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The contentions of the Board[51] and the Union[52] that the decision of the court below (and those of the Court of Appeals for the Ninth Circuit) would involve the Board in purely internal affairs of the Union ignore the above-mentioned factors, as well as the Board's own decision in *Carpenters Local Union No. 22, supra,* page 19. There, the Board held that a union violated Section 8(b)(1)(A) of the Act when it fined a member for allegedly violating a union rule, where the union, according to the Board, utilized the union rule as pretext because of the fined employee's *intraunion* activities. In so holding, the Board stated, "The policies which the Union's conduct here seeks to frustrate are embodied in the Labor-Management Reporting and Disclosure Act of 1959, rather than specifically in the National Labor Relations Act. This difference does not, however, impel a different conclusion."

After referring to language from the Court's decision in *Scofield,* the Board stated (79 LRRM 1196):

> ... (T)he Board is charged with considering the full panoply of congressional labor policies in determining the legality of a union fine. Here the Union, in the guise of enforcing internal union discipline, has sought to deprive its members of the right, as guaranteed by the Labor-Management Reporting and Disclosure Act, to participate fully and freely in the internal affairs of his own union. A fine for that purpose not only in our opinion fails to reflect

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[51]Board's brief, page 13.
[52]Union's brief, pages 17-19.

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> a legitimate union interest but rather in fact impairs a policy that Congress has imbedded in the labor laws. (Footnote omitted).

Similarly, then, an unreasonably excessive fine for working behind a picket line also "impairs a policy that Congress has imbedded in the labor laws" — the policy expressed in Section 7 of the National Labor Relations Act, guaranteeing employees the right to refrain from concerted activities.

In a footnote in *Carpenters, Local 22, supra*, the Board noted (79 LRRM 1196, n. 5):

> ... We are not unmindful of the fact that the Department of Labor, and not this Agency, is directly charged with the administration of the requirement of the Landrum-Griffin Act. We traditionally respect this differentiation. * * * In this area, however, as we understand it, *we have been specifically charged by the Supreme Court with the duty of determining the overall legitimacy of union interests*, and must therefore take into account *all* Federal policies and not limit ourselves to those embodied in our own Act. (Citations omitted; emphasis supplied).

Therefore, in "determining the overall legitimacy of union interests," it is incumbent upon the Labor Board, and not the state courts, to determine and formulate a body of law as to the reasonableness of union imposed fines.

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C. The Board Is Peculiarly Suited To Recognize And Administer Uniformly Those Factors Determinative Of What Is A "Reasonable" Fine.

The Board, if the decision of the Court below is to be upheld, would have the authority to determine whether the Act is violated by the particular fine imposed by a union. The effect of shifting to other fora, scores of different courts of various shades of jurisdiction, the determination of the reasonableness of fines *legally* imposed, would be to place an undue burden upon individual employees and to create a lack of uniformity of justice in the administration by the courts of an issue which can be affected by so many different tests in so many different parts of the country.

Within the Board's own experience under Section 8(b)(5) of the National Labor Relations Act,[53] we find that the particular facts of a case are to be evaluated, and similar standards applied, in deciding whether an unfair labor practice has been committed.

For example, the Board probably would take into consideration the motivation of the imposition of the fine as well as the amount thereof. See, e.g., *Carpenters, Local 22, supra*. Other factors would include the duration of the strike (see *Granite State Joint Board,*

[53]This Section limits the amount of dues or initiation fees that a union may charge employees. The Board is instructed to look to "all the circumstances" to decide if a given amount is "excessive or discriminatory." The "wages currently paid to the employees effected" are deemed to be relevant to the Board's determination. 29 U.S.C. Section 158(b)(5). See, *TV & Radio Broadcasting Studio Employees, supra*, at footnote 42.

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supra). Other factors might be (a) the employees' personal circumstances, particularly their financial desperation; (b) fines imposed by the union, if any, for similar reasons and under like circumstances; (c) whether the amount of the fine is such as to be inordinately disproportionate to the needed protection; (d) the compensation received while employed during the strike; (e) the level of strike benefits, if any, made available to the striking employees; (f) the availability of less harsh union remedies; (g) whether or not the penalty would "impair the member's status as an employee." Pet. App. 29a-30a. Similarly, the method of the payment of the fine and the time period within which it must be paid could be relevant factors, as well as the manner in which charges were filed and processed which led to the imposition of the fine or other penalty. In assessing the reasonableness of a fine the Board might also consider whether or not other sanctions or punishments were imposed upon those who were fined. In the instant case, for instance, members were barred from holding office in the Union for a period of five years. Still another possible factor in determining the reasonableness of the fine might be whether the employees were informed in advance that they would be violating a union rule if they worked behind a picket line, and whether they were warned in advance that they would be penalized and to what extent or degree.[54]

It is inconceivable that the multiplicity of factors that may be involved in resolving the issue of reason-

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[54]Cf. A. 15, n. 19.

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ableness can be entrusted to the courts, rather than to a single administrative body, without the effects of confusion and inequities.

Also entitled to consideration is the likely effect upon the individual employee, faced with the choices of (a) exercising his rights under the Act or (b) a lawsuit at considerable personal expense in which he resists a substantial union fine. Denied the National Labor Relations Board as the forum for resolving this issue at no expense to him, will his rights under Section 7 be frustrated because he cannot afford an attorney and possible court costs to test the penalty assessed by an affluent union?

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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